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Avoiding Sanctions under Federal Rule 11: A Lawyer's Guide to the "New" Rule

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NOTE

AVOIDING SANCTIONS UNDER FEDERAL RULE 11: A LAWYER'S GUIDE TO THE "NEW" RULE

INTRODUCTION

Early and ongoing judicial management is essential if the judicial process is to survive. It is now obvious that adversarial lawyers are unable to achieve proper management alone. This new procedure may necessitate changes in the practice of many judges and attorneys, but unless we are willing to innovate and break away from our present conduct, excess costs and delays will geometrically multiply, and the result will be the denial of justice in our courts.[1]

The "new" Rule 11 of the Federal Rules of Civil Procedure[2] is now six years old. The rule has brought with it a trend towards the more

1. Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 464 (8th Cir. 1983).
2. FED. R. CIV. P. 11 (amended in 1983).

frequent hearing of Rule 11 claims by the courts as well as the more frequent imposition of sanctions for its violation.[3]

The American legal system requires that all parties bear the burden of their own attorney's fees and costs. While there are numerous exceptions to this rule,[4] none dampen the adversarial process like Rule 11.

After the new rule was adopted, the Eighth Circuit initially hesitated to impose sanctions pursuant to it.[5] But the court system gave strong warnings that failure to comply with Rule 11 would result in the imposition of penalties.[6] Apparently, these warnings were not heeded by litigants or their counsel. In recent years, the number of Rule 11 based disciplinary actions in the Eighth Circuit has skyrocketed.[7]

The "looming specter"[8] of Rule 11 is no longer a dormant threat to advocates: it is now a reality every practicing attorney must face. Today, the use of Rule 11 sanctions in the Eighth Circuit is prevalent, and punishment for its violation has never been more severe. Recently, in *Lupo v. Rowland, and Co.*,[9] the Eighth Circuit affirmed a decision imposing fees in the amount of $100,000, half of that figure

3. Since Rule 11 was amended in 1983, the number of cases in which the courts of appeal have issued opinions concerning Rule 11 has increased dramatically. In 1983, these courts issued only one published opinion discussing the rule. In 1984, the number of published opinions rose to ten. By 1987, the total number of published opinions concerning Rule 11 issues was eighty-two. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 234 (1988). This survey covered only those cases which were published in the Federal Reporter Second, Federal Supplement and Federal Rule Decisions. *Id.*

In 1983, the courts of appeal affirmed the district courts' findings of no Rule 11 violations in the only published Rule 11 opinion issued that year. In 1984, in either affirming the district courts' findings of Rule 11 violations or in reversing the district courts' finding of no Rule 11 violations, the courts found violations in only two of the ten cases in which the courts issued published opinions. In contrast, in 1987, the courts of appeal found Rule 11 violations in thirty-four of the eighty-two cases in which opinions were published. *Id.*

4. *See, e.g.*, 5 U.S.C. § 552a(g)(2)(B) (1988 ed.); 28 U.S.C. § 1927 (1988); 42 U.S.C. § 2000a-3(b) (1988). For a further discussion of statutory exceptions to the rule, see Nemeroff v. Abelson, 620 F.2d 339, 349–50 (1980).

5. *See, e.g.*, Ueckert v. C.I.R., 721 F.2d 248, 250–51 (8th Cir. 1983).

6. *Id.*

7. More Rule 11 appellate decisions were published by the Eighth Circuit in 1987 than in 1983, 1984, 1985 and 1986 combined. Vairo, *supra*, note 3.

8. In Baxley-Delamar Monuments, Inc. v. American Cemetery Assoc., 843 F.2d 1154 (8th Cir. 1988), the Eighth Circuit affirmed the district court's dismissal of plaintiff's state law claims and warned "it should not be necessary to remind counsel that their claims shall doubtless meet more vigorous tests in the near future and the spectre of Rule 11 sanctions looms for any allegations made without reason to believe they were well-grounded in fact." *Id.* at 1158.

9. 857 F.2d 482 (8th Cir. 1988).

to be paid personally by the two attorneys sanctioned.[10]

Lupo arose from the case of *Bastien v. Rowland*[11] in which plaintiffs argued fraud on the basis of defendants sale to them of a high-risk limited partnership. The Eighth Circuit agreed with the trial court's decision that Rule 11 sanctions should be imposed on plaintiffs and their counsel because the claim was meritless.[12] The most chilling aspect of *Lupo* is the Eighth Circuit's apparent endorsement of a more liberal interpretation of the amended language in Rule 11. This rule expressly concerns itself with the signing by an attorney of a "pleading, motion or other paper."[13] Despite this language, the Eighth Circuit upheld the trial court's imposition of sanctions based on the *full record* rather than on a specific paper. The court agreed with the district court that the suit was "frivolous, and abusive, and not directed toward the 'just, speedy and inexpensive determination of the action.' "[14] The Eighth Circuit refused to accept the defendants' contention that the lower court's decision to base its findings on the "bulk of the filings" and "conduct" rather than on a specific document was fundamentally unfair. The defendants further argued that failure to specify a document which violated Rule 11 resulted in the absence of fair notice to prepare their defense in the evidentiary hearing. In its response, the court simply stated, "Although we prefer that courts identify specific pleadings or other documents imposing Rule 11 sanctions, we find that the district court had adequate support for proceeding as it did and that [the defendants] had fair notice of the basis of the court's ruling."[15]

This liberal interpretation of Rule 11 is not an isolated case. Only three months after the *Lupo* decision, the Eighth Circuit in *Equal Employment Opportunity Commission v. Milavetz and Associates*[16] affirmed Rule 11 sanctions on similar grounds. The Rule 11 *Milavetz* action stemmed from a suit in which the Equal Employment Opportunity Commission alleged that Blue and White Service Corporation, a taxi service, refused to hire an applicant because the individual had previously filed an employment discrimination charge.[17] The Eighth Cir-

10. *Id.* at 486.

11. 631 F. Supp. 1554 (E.D. Mo. 1986), *aff'd*, Lupo v. R. Rowland & Co., 857 F.2d 482 (8th Cir. 1988), *cert. denied*, Bastien v. R. Rowland & Co., 108 S. Ct. 160 (1988).

12. *Id.*

13. FED. R. CIV. P. 11 (1983).

14. *Lupo*, 857 F.2d at 485 (*quoting* Bastien v. Rowland & Co., 116 F.R.D. 619, 621 (E.D. Mo. 1987) (Bastien II), one of two original actions from which *Lupo* arose).

15. *Lupo*, 857 F.2d at 485.

16. 863 F.2d 613 (8th Cir. 1988). *See also* "Appeals court rebukes law firm for conduct in discrimination case," St. Paul Pioneer Press and Dispatch, Feb. 23, 1989, at 14A.

17. *Id.*

cuit upheld the district court's imposition of Rule 11 penalties based upon "a pattern of uncooperativeness and delay [which] had begun before litigation even commenced."[18] The Eighth Circuit ordered fees of $5,500.00 to be paid by Blue and White and Milavetz jointly.[19] These recent readings of Rule 11 must be seriously analyzed by the legal community in the Eighth Circuit. The new rule itself broadened the scope within which sanctions may be imposed.

The Eighth Circuit's liberal rulings in *Lupo* and *Milavetz* broaden the scope further and thereby increase the possibility that advocates, already fearful of Rule 11 retribution under the amended rule, may choose not to bring meritorious claims. These interpretations could narrow the range of issues heard by the courts and ultimately affect the course and development of the law in the Eighth Circuit.

This Note will focus on Eighth Circuit decisions since the rule was amended, and will examine the following aspects of Rule 11: (1) components of the new rule; (2) examples of Rule 11 violations; (3) procedural requirements; (4) the prevention of sanctions under the new rule; and (5) analysis of the effect of a liberalized interpretation.

I. COMPONENTS OF THE NEW RULE

Rule 11, as amended in 1983, provides that:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay, or needless increase in the cost of litigation. . . .[20]

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18. *Id.* at 614, (*quoting* EEOC v. Blue & White Serv. Corp., slip op. at 6 (D. Minn. May 14, 1987) (unpublished memorandum and order)).

19. *Id.*

20. FED. R. CIV. P. 11. The previous rule read as follows (deletions in the 1983 amendment are italicized):

> Every pleading of a party represented by an attorney shall be signed by at least one attorney. . . . A party who is not represented by an attorney shall sign his pleading. . . . The signature of an attorney constitutes a certificate by him that he has read the pleading, that to the best of his knowledge, information and belief *there is good ground to support it; and that it is not interposed for delay. If a pleading is signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading*

A. No Longer the "Pure Heart, Empty Head" Defense

Rule 11, as originally promulgated in 1938, required the element of bad faith.[21] The Supreme Court declared in its first interpretation of the rule that attorney's fees may be assessed only "when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons."[22] Because, the predecessor to the amended rule required a "willful violation" before sanctions could be imposed, this subjective standard made it necessary to determine counsel's state of mind, and an attorney's assertion of good faith be disproved.[23] Because of the difficulty in meeting this burden, Rule 11 violations were not easy to prove. However, the amended rule has eased this burden by providing requirements more stringent than mere good faith, since the reference in the former text to willfulness as a prerequisite to disciplinary action has been deleted.[24]

Shortly after the amended Rule 11 went into effect, the District Court of Minnesota, in *Van Berkel v. Fox Farm and Road Mach.*,[25] refused to accept as a Rule 11 defense the attorney's personal affidavit that he acted in good faith. The court underscored the significance of the amended rule when it stated that "[a]ttorneys are officers of the court and [as such] their first duty is to the administration of justice."[26] The counselor's claim that he had an ethical duty not to move on the action before discussing it with his client failed to persuade the trial court. In its opinion, the court explained: "Whenever an attorney's duties to his client conflict with those he owes to the public as an officer of the court, he must give precedence to his duty to the public. Any other view would run counter to a principled sys-

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had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Id.

21. The original rule stated that disciplinary action could be taken only for "a willful violation of this rule . . . [or if] scandalous or indecent matter is inserted [into the pleading]. . . ." FED. R. CIV. P. 11 (1938).

22. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258–59 (1975). But several other statutes and rules providing for attorney's fees did not require the bad faith element from their inception. For example, in a Title VII action, the Supreme Court noted: "[T]he term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him." Obin v. Dist. No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers, 651 F.2d 574, 577 (8th Cir. 1981) (*citing* Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).

23. At least one circuit has suggested that the "pace of discovery" should be used as a factor in determining the state of mind of the client and his counsel. Nemeroff v. Abelson, 704 F.2d 652, 660 (2nd Cir. 1983).

24. FED. R. CIV. P. 11; *see also*, Advisory Committee's Notes to the Federal Rules of Civil Procedure (1983).

25. 581 F. Supp. 1248 (D. Minn. 1984).

26. *Id.* at 1251.

tem of justice."[27] Similarly, other courts have recognized the importance of the amended rule. The Ninth Circuit, for example, has noted that without the good faith defense, the "new" rule would encompass a much wider range of circumstances.[28]

The new test is one of reasonableness, judged by an objective standard.[29] Although several circuits persisted in employing the "pure heart, empty head" standard following the 1983 amendment to Rule 11,[30] by the end of 1986 all of the circuits, including the Eighth, had adopted and applied the objective standard by decision.[31]

The Eighth Circuit has upheld the use of an objective reasonableness standard,[32] not the subjective bad faith standard that was used by courts prior to the 1983 amendment.[33] Furthermore, the Eighth Circuit has declared that, even in the case of the *pro se* litigant, parties may no longer argue that their "good faith" excuses their actions.[34]

Unlike Rule 11, several state statutes regulating attorney conduct

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27. *Id.*

28. Zaldivar v. Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986) (*quoting* Notes of the Advisory Committee to Rule 11). "Rule 11, as amended, is intended to be applied by district courts vigorously to curb widely acknowledged abuse from the filing of frivolous pleadings, and other papers." *Id.*

29. *Id.* at 830–31.

30. *See, e.g.,* Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234, 1238 (4th Cir. 1984); Suslick v. Rothschild Securities Corp., 741 F.2d 1000, 1001, 1007 (7th Cir. 1984).

31. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 207 (1988). *See* Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985); Davis v. Veslan Enter., 765 F.2d 494, 497 n.4 (5th Cir. 1985); Indianapolis Colts v. Mayor & City Council of Baltimore, 775 F.2d 177, 181 (7th Cir. 1985); Moore v. City of Des Moines, 766 F.2d 343, 346 (8th Cir. 1985); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Hashemi v. Campaigner Publications, Inc., 784 F.2d 1581, 1583 (11th Cir. 1986); Burkhart v. Kinsley Bank, 804 F.2d 588 (10th Cir. 1986); Confederacion Laborista v. Cerveceria India, Inc., 778 F.2d 65, 66 (1st Cir. 1985); Chu v. Griffith, 771 F.2d 79, 81 (4th Cir. 1985); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1170 (D.C.Cir. 1985); Maier v. Orr, 758 F.2d 1578, 1584 (Fed. Cir. 1985); *see also* Albright v. Upjohn Co., 788 F.2d 1217, 1221–22 (6th Cir. 1986); *but see* Nesmith v. Martin Marietta Aerospace, 833 F.2d 1489, 1491 (11th Cir. 1987) (stating that Rule 11 requires "bad faith," but acknowledging that the rule "incorporates objective standard in assessing bad faith"). *Id.* at n.94.

32. *See* O'Connell v. Champion, 812 F.2d 393, 395 (8th Cir. 1987) (objective standard applies under Rule 11); Kurkowski v. Volcker, 819 F.2d 201, 204 (8th Cir. 1987). "They cannot now argue that their subjective 'good faith' (i.e. ignorance of the law or legal procedures) somehow excuses their actions." *Kurkowski*, 819 F.2d at 204.

33. O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987). The court noted that, unlike Rule 11, 28 U.S.C. § 1927 (1980) requires both unreasonable *and* vexatious conduct. While the court would not deal with the question of what standard may be appropriate in a § 1927 action, it indicated that it may require the use of both an objective and subjective test. *Id.* at 395, n.2.

34. Kurkowski v. Volcker, 819 F.2d 201, 204 (8th Cir. 1987); *accord O'Connell*, 812 F.2d at 395.

within the Eighth Circuit still are limited to bad faith.[35] Thus, actions against attorneys are frequently brought under both Rule 11 and state statutes. In Minnesota, for example, the statute regulating attorney conduct requires that the assertion of a frivolous claim be "knowing."[36] Therefore, unlike the federal rule, a claim brought under the Minnesota statute must still meet the subjective test. The significance is sharp: under a Rule 11 action, once counsel signs a document her good or bad faith becomes irrelevant. The only remaining issue is whether the claim is frivolous, unfounded or harassing.[37]

B. "Reasonable Inquiry"

In Rule 11 claims, the reasonable inquiry requirement eliminates the possibility that counsel may argue ignorance as a defense. The Advisory Committee Notes state that in determining what is reasonable a judge must be flexible: "[W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether [she] had to rely on a client for information as to the facts underlying the . . . paper; . . . whether [she] depended on forwarding counsel or another member of the bar."[38]

The standard focuses on the actual inquiry made, not the individual who made the inquiry, therefore, it does not appear to require that the attorney perform the investigation herself. However, the fact that attorneys other than the Rule 11 defendant counsel participated in the investigative process, offered advice on the pleadings, or co-signed the complaint will not excuse the attorney if the objective standard is not met.[39] Even when a different law firm initially drafts and pursues the action, the Rule 11 violator may not be insulated from liability.[40] As observed earlier, the question is not *who* makes the inquiry, but whether the inquiry results in the accumulation of enough knowledge to justify the signing of the certificate by the attorney.[41]

The burden of making a "reasonable inquiry" is not difficult. In all cases, basic discovery must be completed to disclose any fatal de-

35. *See, e.g.*, MINN. STAT. § 549.21 subd. 2 (1988); NEB. REV. STAT. § 25–824 (1985).

36. MINN. STAT. § 549.21 subd. 2 (1988).

37. FED. R. CIV. P. 11.

38. FED. R. CIV. P. 11 (1983 amendment) Notes on Advisory Committee on Rules.

39. Brandt v. Schal Assoc., Inc., 121 F.R.D. 368, 378 (N.D. Ill. 1988).

40. *Id.*

41. *See* Schwarzer, *Sanctions Under The New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 187 (1985).

fects in a claim, and the litigant must be able to articulate both factual and legal bases upon which a court could grant the requested relief.[42] In diversity issues, the plaintiff must make a reasonable investigation into the nature, quantity and quality of contacts between the defendant and the forum state before filing a complaint.[43] In claims in which the statute of limitations may bar an action, sanctions will not be imposed simply because the defense that the statutory period has expired is strong. Provided a reasonable inquiry has discovered grounds for tolling the statutory period (such as the relations-back doctrine), the plaintiff's claim will not violate Rule 11 guidelines.

II. Examples of Rule 11 Violations

Rule 11 states that sanctions will be imposed if the attorney's actions are meritless, frivolous, cause harassment, or avoidable delay, or unnecessary increase in the cost of litigation.[44] However, because sanctions are imposed on a case-by-case basis, and vary with the facts in each case, an analysis of specific instances in which the courts have found Rule 11 violations may clarify this issue.

A. Duty of Candor in Citing Existing Law

Rule 11 mandates that all documents be "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . ."[45] This requirement was discussed by the Seventh Circuit in *Brandt v. Schal Associates, Inc.*,[46] a case involving a complex contract dispute between a construction management firm and a contractor. In *Brandt*, the plaintiff alleged that the defendant-management firm had violated the Racketeer Influenced and Corrupt Organization Act (RICO). The defendants brought a Rule 11 action against the plaintiff's attorney asserting that, at the time the complaints were filed, there was insufficient evidence to justify the lawsuit, and alleging that the plaintiff's attorney violated the "warranted in existing law" requirement of Rule 11 in each complaint.[47] The court declared that the attorney in question "needed a fraudulent scheme on which to hang the charged RICO predicate acts of

42. It is clear that basic discovery must still be completed to disclose any fatal defects in a claim. In bringing all motions, plaintiff must be able to articulate both factual and legal bases upon which a court could grant the requested relief. *Id.* at 186.

43. *See* Hasty v. Paccar, Inc., 583 F. Supp. 1577, 1580 (E.D. Mo. 1984).

44. Fed. R. Civ. P. 11.

45. *Id.*

46. 121 F.R.D. 368 (N.D. Ill. 1988).

47. *Id.* at 369–70.

mail and wire fraud,"[48] and that the alleged false and fraudulent backcharges did not satisfy the "pattern of racketeering activity" necessary for a RICO violation.[49]

The court assessed monetary sanctions against the attorney, finding that "his error was not in failing to uncover evidence contradicting his claim, but rather in concocting a claim in the absence of any evidence to support it."[50]

It would seem logical that a corollary to the Rule 11 requirement that a claim be warranted by existing law is the duty of candor in citing existing law. In *Golden Eagle Distributing Corp. v. Burroughs Corp.*,[51] the trial court held that misstatement of controlling law constituted a Rule 11 violation.[52] *Golden Eagle* involved an action, originally brought in a Minnesota state court and then removed to federal court in Minnesota, for fraud, negligence and breach of contract against the defendant because of an allegedly defective computer system.[53] On defendant's motion the case was transferred to the Northern District of California. The defendant then moved for summary judgment arguing that California, not Minnesota, law applied, hence, that the plaintiff's claims were barred by the statute of limitations.[54] The trial judge noted the glaring differences between the memorandum originally submitted to support the choice of law issue, and the Rule 11 memorandum explaining the grounds upon which the choice of law arguments were based.[55] In the court's view, the second memorandum conceded that the original argument was not based on existing law.[56] The Ninth Circuit Court of Appeals disagreed and reversed the lower court for several reasons.

First, this interpretation would "require district courts to judge the ethical propriety of lawyer's conduct with respect to every piece of paper filed in federal court."[57] Second, satellite litigation stemming from the Rule 11 allegation results in excessive costs to all concerned parties.[58] In addition to the enormous expense,[59] "what is at

48. *Id.* at 387.
49. *Id.* at 371, 387–88.
50. *Id.* at 389.
51. 103 F.R.D. 124 (N.D. Ca. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986).
52. 103 F.R.D. at 128.
53. *Id.* at 125.
54. *Id.*
55. *Id.* at 126. The second memorandum was submitted at the direction of the court. Counsel was asked to explain why Rule 11 sanctions should not be imposed for submitting an unsubstantiated argument in the first memorandum. *Id.* at 125.
56. *Id.* at 127.
57. *Golden Eagle*, 801 F.2d at 1539.
58. *Id.* at 1540. Examples of satellite litigation include later actions by the client against her attorney's actions, and actions brought by one counselor against another counselor who assisted in the original litigation.
59. *See id.* at 1541.

stake is often not merely the monetary sanction but the lawyer's reputation."[60] Because "[i]t is not always easy to decide whether an argument is based on established law or is an argument for the extension of existing law; [and also because] [w]hether the case that is being litigated is or is not materially the same as earlier precedent is frequently the very issue which prompted the litigation in the first place,"[61] the court refused to extend Rule 11 to cases involving the duty of citing existing law.

B. Inadequate Research and Investigation of Claims

Rule 11 sanctions may be imposed for the failure of an attorney to reasonably research and investigate the facts of the case prior to filing an action as was the case in *Viola Sportswear, Inc. v. Mimun*.[62] In *Viola*, defendants sold a pair of Sasson jeans to the plaintiffs. Because the plaintiffs had the sole and exclusive license to manufacture and sell the jeans, they brought an action against defendants, alleging trademark infringement and unfair competition.[63] While the action on its face appeared reasonable, the single sale of the $10 pair of jeans was the only such sale ever made by defendants, and did not appear to justify the charge by plaintiff's counsel that the defendants were involved in a nationwide trademark conspiracy.[64]

During defendant's discovery, the president of the plaintiff corporation admitted at his deposition that he had never seen the complaint nor any relevant documents or reports concerning the case and, furthermore, that he had no evidence of a nationwide conspiracy.[65] In fact, he conceded that the jeans in question may have been manufactured prior to the date on which the corporation received its license.[66] Based on these admissions, the defendants requested that the plaintiff's counsel dismiss the action. He refused, and instead proceeded with the litigation.

The court assessed Rule 11 sanctions against both the plaintiff and its attorney, and chastised the counselor for not attempting to investigate the validity of the complaint through discovery.[67] Failure by the attorney to make a diligent effort to investigate, and failure by his client to do the same resulted in the assessment of $20,000 in attor-

60. *Id.*
61. *Id.*
62. 574 F. Supp. 619 (E.D.N.Y. 1983).
63. *Id.* at 619–20.
64. *Id.* at 620.
65. *Id.*
66. *Id.*
67. *Id.* at 621. The court noted that Rule 11 stipulates that the signature of the attorney in a pleading indicates that he believes the matter to be well grounded in fact and that this belief is "*formed after reasonable inquiry.*" *Id.*

ney's fees against them, jointly and severally.[68]

C. *Ignoring Events Subsequent to Filing of Complaint That Undermine Original Complaint*

Andre v. Merrill Lynch Ready Assets Trust[69] involved a second suit brought against the defendants concerning a payment they received for the management of a Ready Assets Fund. Their first suit had been dismissed after a trial on the merits, and an appeal affirmed this dismissal.[70] The complaint in the second suit was also dismissed on the merits after an evidentiary hearing.[71] The plaintiff then filed a verified amended complaint which reiterated a majority of claims which the Second Circuit Court of Appeals had already expressly dismissed.[72] The trial court held that,

> [w]hile there is no question that a plaintiff who has a colorable basis for a claim and who acts in good faith need not apprehend that defeat on the merits of her lawsuit will require her to pay her adversaries' legal fees, a plaintiff and her counsel who act in bad faith and for their coercive and prejudicial effect to assert legal claims without a colorable basis for the claim are liable for sanctions under Rule 11.[73]

The court ruled that advancing claims previously found to be meritless constituted a clear violation of Rule 11.[74] For these reasons, a penalty of $5,000 in attorney's fees was assessed against the attorney

68. *Id.* A similar conclusion was reached by the court concerning a Rule 11 violation resulting from failure to make a reasonable inquiry during discovery in Hasty v. Paccar, Inc., 583 F. Supp. 1577 (E.D. Mo. 1984). In this diversity action, plaintiff sought to invoke federal jurisdiction and thus had the burden of establishing that jurisdiction existed. The court held that, "in view of plaintiff's utter failure to come forward with evidence of even the slightest connection" between the defendant and the state in which jurisdiction was requested, the counsel for plaintiff had violated his Rule 11 duty to make "a reasonable inquiry." *Id.* at 1580. This failure to find evidence to support the exercise of in personam jurisdiction resulted in defendant's being put to unnecessary expense in defending his position. While the court did not impose sanctions, it suggested that the defendant "may wish to file a motion to impose sanctions against plaintiff's counsel . . . in the amount of [defendant's] costs and attorney's fees in defending this action to date." *Id.*

69. 97 F.R.D. 699 (S.D.N.Y. 1983).

70. *Id.* at 699.

71. *Id.*

72. *Id.* at 701.

73. *Id.* at 700. What may have angered the court most was the fact that, in her Verified Amended and Supplemental Complaint, counsel used the *future* tense in stating that the court's decision concerning the original *Andre II* complaint "*will* not" determine the issues raised in the amended complaint. The court found that failure by plaintiff's counsel to use the present tense demonstrated "that plaintiff made no good faith determination of the invalidity of her claims in light of the rulings by this Court and the Second Circuit." *Id.* at 702.

74. *Id.*

and client.[75]

Failure to base claims on existing law, inadequate discovery and refiling claims which have been dismissed are common grounds for imposing Rule 11 sanctions. However, this is not an exhaustive list of when Rule 11 sanctions will be imposed. With the possibility of "sanctionitis"[76] reaching epidemic proportions in the years ahead, the more frequent imposition of penalties is likely.

III. Procedural Requirements

A. Initiating a Rule 11 Action

Rule 11 mandates that "[i]f a pleading, motion, or other paper is signed in violation of this rule, the court upon motion or *upon its own initiative*, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . ."[77]

In most instances, a party believing Rule 11 violations have occurred will file a motion to request sanctions against the opposing litigants. Failing this, however, it becomes the duty of the trial court to impose sanctions. In *Roadway Express Inc. v. Piper*,[78] the Supreme Court found that "[t]he power of a court over members of its bar is at least as great as its authority over litigants."[79] Thus, the Court has recognized the inherent power of the trial courts to impose sanctions including attorneys fees, dismissal, and contempt proceedings.[80]

1. Powers of the District Court

The Supreme Court has emphasized that one of the inherent powers of the district courts is the use of sanctioning devices " 'in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court. . . .' "[81] However, because such powers are "shielded from direct democratic controls, they must be exercised with restraint and discretion."[82]

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75. *Id.* at 703.

76. The Eighth Circuit, in Aetna Casualty & Surety Co. v. Fernandez, 830 F.2d 952 (8th Cir. 1987), stated: "We are also mindful that excessive 'sanctionitis' under Rule 11 (as Judge Becker of the Third Circuit calls it) might discourage or 'chill' vigorous and ingenious advocacy. . . ." *Id.* at 956.

77. Fed. R. Civ. P. 11 (emphasis added).

78. 447 U.S. 752 (1980).

79. *Id.* at 766 (footnote omitted).

80. *Id.* at 764–65.

81. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (*quoting* Cooke v. United States, 267 U.S. 517, 539 (1925)). *See also* 4 W. Blackstone, Commentaries 282–85.

82. *Id.* at 764. *See also* Grompers v. Buckstove & Range Co., 221 U.S. 418, 450–51 (1911); Green v. United States, 356 U.S. 165, 193–94 (1958) (Black, J., dissenting).

In recognizing the authority of the district court to impose sanctions, the Eighth Circuit, in *Kurkowski v. Volcker*,[83] upheld the trial court's decision to assess penalties under Rule 11 even after the plaintiffs voluntarily dismissed the claim.[84] The Eighth Circuit held that the trial court possessed the power to issue a post-dismissal Rule 11 order for two reasons. First, matters outside the pleadings had been submitted, so that the motion was one for summary judgement (therefore the automatic dismissal provisions did not apply). Second, the court's inherent authority to impose sanctions extended

83. 819 F.2d 201 (8th Cir. 1987).

84. *Id.* at 202. The fact that a plaintiff, faced with a request by the defense to impose Rule 11 sanctions, elects to dismiss the action will not necessarily result in the refusal by the court to impose judgment on the Rule 11 issue. The factual situation in *Kurkowski* is similar to that in *Andre II*, as both involve the issue of claims being raised after a court had previously dismissed identical claims involving the same action.

Kurkowski involved plaintiff farmers in a class action against businesses in the farm credit system. Several of the defendants requested that the district court impose sanctions under Rule 11 because some of the same plaintiffs had previously filed identical claims against some of the same defendants. Many of these claims had already been dismissed for failure to state a claim upon which relief could be granted. Plaintiff's counsel filed a notice of voluntary dismissal and the court dismissed the case without prejudice. However, the defendants persisted in requesting that sanctions be assessed against the plaintiffs, and the court then modified its order to hear the sanctions issue. The district court granted the requested penalties, ordering the plaintiffs to pay over $5000 in attorney's fees. *Kurkowski*, 819 F.2d at 202–03.

This decision by the Eighth Circuit seems to indicate an unwillingness to allow parties bringing frivolous suits to be "let off the hook" by dismissing the case at the point when Rule 11 sanctions appear imminent.

In an earlier decision, involving similar facts, the court allowed the plaintiff to withdraw his claim—even when that party failed to properly file required documents for withdrawal. In Foss v. Federal Intermediate Credit Bank of St. Paul, 808 F.2d 657 (8th Cir. 1986), plaintiffs commenced an action seeking a judgment invalidating a debt to the defendants. Additionally, the plaintiff sought an injunction restraining the defendants from proceeding on a foreclosure of plaintiffs' property as well as $23 million in compensatory and punitive damages. Defendants brought a motion for a more definitive statement pursuant to Rule 12(e). Consequently, an evidentiary hearing was ordered. Following the hearing, the magistrate concluded that the complaint lacked merit and should be dismissed. The plaintiff petitioned the district court for review and then tendered a voluntary dismissal. The district court refused to allow the dismissal because the plaintiffs failed to file the proper dismissal documents with the court.

On appeal the Eighth Circuit reversed. The court refused to accept the defendants' argument that, "by finding the complaint without merit and frivolous for purposes of [Rule 11] and by considering matters outside of the pleadings, the district court converted its own Rule 11 inquiry into the equivalent of a motion for summary judgment." *Id.* at 659. Instead, the court reversed the district court's Rule 11 imposition of attorney's fees and allowed the voluntary dismissal. The court held that since at the time the plaintiffs filed their notice of voluntary dismissal with the district court, the defendants had not served an answer or a summary judgement motion, the district court erred in disallowing the dismissal. *Id.*

even after dismissal of the claim.[85]

There are, however, limitations to a district court's authority under Rule 11. For example, if a plaintiff files a notice of voluntary dismissal and the defendant has not yet served an answer or a motion for summary judgement, the district court is without jurisdiction and therefore, without Rule 11 authority.[86] The Eighth Circuit has also taken the position that additional sanctions cannot be imposed under Rule 60(b) of the Federal Rules of Civil Procedure,[87] which allows the court to grant relief from a final order or judgement for mistake, newly-discovered evidence, fraud, voidness, satisfaction or other reasons,[88] because the rule cannot be used to impose additional affirmative relief.[89]

2. *Due Process Requirements*

Although the district court has the authority to impose Rule 11 sanctions, whether of its own accord or by request of opposing counsel, it may not do so without providing appropriate due process safeguards.

Procedural due process requires notice and a hearing before any governmental deprivation of a property interest.[90] The United States Supreme Court has stated, "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."[91]

Observing due process requirements will serve several important functions: (1) the attorneys will have an adequate opportunity to prepare their defense; (2) they will be afforded the chance to explain the conduct in question in an oral presentation; (3) the presiding judge will have sufficient time to analyze the severity of the suggested sanction in view of the attorneys' explanation for their actions; and (4) the facts supporting the sanction will appear in the record, which will serve to facilitate appellate review.[92]

While all courts agree that the accused has due process rights, the nature and scope of these rights in a Rule 11 violation remains unclear. The Supreme Court's opinion, in *Roadway Express*,[93] implies that the due process concerns vary depending on the penalty which

85. *Kurkowski*, 819 F.2d at 203.
86. *See, e.g., Foss*, 808 F.2d at 657.
87. FED. R. CIV. P. 60(b).
88. *Id.*
89. *See* Adduono v. World Hockey Ass'n, 824 F.2d 617, 620 (8th Cir. 1987).
90. *See* Miranda v. Southern Pacific Transport Co., 710 F.2d 516, 522 (9th Cir. 1983).
91. Roadway Express Inc. v. Piper, 477 U.S. 752, 767 (1980).
92. *Miranda*, 710 F.2d at 522–23.
93. 477 U.S. at 767.

is imposed on the attorney. The Court in dicta noted, "The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers."[94]

Unlike monetary sanctions imposed against counsel or punishment of the attorney, dismissal of the action has harsh consequences for the client as well as the attorney. The due process safeguards are as vital in a dismissal order as in other sanction forms because such an order punishes the client as well as the attorney, regardless of the client's contribution to the wrongdoing which resulted in dismissal.

However, even in the case of dismissal, the Supreme Court in *Link v. Wabash Railroad Co.*,[95] found that neither the failure to receive notice of the possibility of dismissal nor the lack of an adversary hearing violated due process or rendered the dismissal void. Addressing the constitutional right to due process, the Court stated:

> But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.[96]

The Court affirmed the district court's dismissal of petitioner's personal injury action which was based in part on the lawyer's failure to appear at a pretrial conference.[97]

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94. *Id.* at n.14. In cases concerning due process guidelines in administrative claims, the Supreme Court has ruled that, while due process is mandated even in the deprivation of small amounts of property, the severity of the deprivation is a factor in determining the appropriate form of the evidentiary hearing. Goss v. Lopez, 419 U.S. 565, 579 (1975).

The Court has provided four factors to be weighed in considering the amount of process due in a given case: (1) the interest that will be affected by the official action; (2) the risk of a wrongful deprivation of the interest through procedures used; (3) probable value of additional procedural safeguards; and (4) the government's interest (including financial and administrative burdens) that additional procedural requirements would entail. Matthew v. Eldridge, 424 U.S. 319, 335 (1976).

The four factors provided the basis for a separate opinion in *Miranda*, dissenting on the due process issue. *Miranda*, 710 F.2d at 524–25.

95. 370 U.S. 626 (1962).

96. *Id.* at 632.

97. *Id.* at 633. However, Justice Black (dissenting), expressed the opinion that the court's ruling was fundamentally unfair:

> [I]t seems to me to be contrary to the most fundamental ideas of fairness and justice to impose the punishment for the lawyer's failure to prosecute upon the plaintiff who, so far as this record shows, was simply trusting his lawyer to take care of his case as clients generally do. The Court dismisses this whole question of punishing the plaintiff Link for the alleged fault of his lawyer with the single generalized statement: "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."

Id. at 643–44.

It has been suggested that the *Link* Court took "the position that no hearing is constitutionally compelled in certain circumstances where *established rules* are transgressed. One immediate difficulty, of course, is determining what are 'established rules.' "[98] The ambiguity surrounding the amount of due process required prior to an imposition of Rule 11 sanctions has led at least one commentator to recommend that standards and requirements for notice and hearing be developed through local rules to prevent arbitrary imposition of sanctions.[99]

While such local rules have not yet been implemented, the courts appear to be recognizing the necessity for such "standards." The Eleventh Circuit has declined to enunciate a specific rule, noting that varying situations mandate flexible standards. Among the factors to be considered are:

> The interests of attorneys and parties in having a specified sanction imposed only when justified; the risk of an erroneous imposition of sanctions under the procedures used and the probable value of additional notice and hearing; and the interests of the court in efficiently monitoring the use of the judicial system and the fiscal and administrative burdens that additional procedural requirements would entail.[100]

Although the Eighth Circuit has not yet adopted standards or local rules, it has addressed the due process questions posed by Rule 11. In *Bastien*[101] it held that, while a district court may impose sanctions against attorneys, it may not do so without affording them procedural due process at least as protective as that provided by Rule 46(c) of the Federal Rules of Appellate Procedure, which provides:

> A court of appeals, may, after reasonable notice and an opportunity to show cause to the contrary, and, after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.[102]

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98. Oliphant, *Rule 11 Sanctions and Standards: Blunting the Judicial Sword*, 12 WM. MITCHELL L. REV. 731, 743 (1986) (emphasis in the original).

99. *Id.* at 740.

100. 118 F.R.D. 189, *quoting* Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987).

101. 116 F.R.D. 619 (E.D. Mo. 1987).

102. FED. R. APP. P. 46(c). *See* Bastien v. Rowland & Co., 116 F.R.D. 619, 620 (E.D. Mo. 1987) (predecessor case to the *Lupo* case discussed above). The Ninth Circuit has upheld the right to an evidentiary hearing "absent extraordinary circumstances." One such circumstance which that court sees as compelling no review is summary criminal contempt proceedings, where "instant action is necessary to protect the judicial institution itself." *Miranda*, 710 F.2d at 522. In non-summary contempt cases, a "reasonable time to prepare a defense varies according to the circumstances in each case." *Id.* at 524. In one instance, ten minutes was considered reasonable. *Id.*

In *Miranda*, the court held that counsel's failure to comply with local rules re-

The trial court in *Lupo* recognized that "Rule 11 does not address the procedural rights of attorneys and clients who are threatened with sanctions, and the development of the law is unclear," however at least minimum due process safeguards must be ensured.[103] In the event an evidentiary hearing is allowed, a separate hearing is required to determine sanctions, even when the judgement on the merits is also being questioned. This is because a motion for sanctions is unlike a motion to alter or amend the judgement: "It does not imply a change in the judgement, but merely seeks what is due because of the judgement."[104] Similarly, a district court's order and a claim for Rule 11 violations are separately appealable.

Other courts concur with the *Lupo* decision, finding "[d]ue process requires, at a minimum, notice and an opportunity to be heard 'appropriate to the nature of the case.' "[105] This includes, in the case of monetary sanctions, that "the attorney be given notice of the motion for fees and have an opportunity to address the court before sanctions are imposed."[106] In addition, when the Rule 11 violation is dependent upon facts genuinely in dispute, an evidentiary hearing should be made essential.[107]

B. Appellate Review

The Eighth Circuit has consistently held that the determination to impose a Rule 11 order is within the sound discretion of the district court.[108] It has stated, "Rule 11 makes sanctions mandatory when a violation of the Rule occurs, but whether a violation has occurred is a

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garding pretrial conferences resulted in due process requiring that the judge not "give the lawyers any more notice or hearing than [the court] received." *Id.* at 525. Relevant factors which the appellate court took into consideration in making this pronouncement included: (1) the small fine in question ($250); (2) the fact that additional procedural protections would not have improved the accuracy of the judge's decision; (3) the lawyers did not ask for additional time to prepare their defense; and (4) the belief that, because the reason for the fine was the attorney's irresponsible behavior, he should not be given further time to defend against the charges, thus multiplying the burden on the court even further. *Id.*

103. *See Bastien*, 116 F.R.D. at 621, the predecessor to the *Lupo* case.

104. Obin v. Dist. No. 9, 651 F.2d 574, 581 (8th Cir. 1987).

105. Eastway Construction Corp. v. City of N.Y., 637 F. Supp. 558, 568 (E.D. N.Y. 1986).

106. *Id.* at 568.

107. *Id. See also*, Brandt v. Schal Assoc., Inc., 121 F.R.D. 368, 390 (N.D. Ill. 1988). Another new aspect emerging in Rule 11 proceedings which further promotes the requirement of an evidentiary hearing is the use of "experts" by each party to give opinions on whether the attorney violated the rule. One court has ranked the importance of such experts as so great as to be essential in areas such as patent law or other technically complex fields "in which the facts shown to have been known to the lawyer when he or she filed suit would have to be explained to the court so it could evaluate their objective sufficiency in Rule 11 terms." *Id.*

108. *See, e.g.*, American Inmate Paralegal Ass'n v. Cline, 859 F.2d 59, 61 (8th Cir.

matter for the court to determine, and this determination involves matters of judgment and degree."[109] While judgment against a party for a Rule 11 violation is clearly appealable, the trial court's decision will be given great deference,[110] because the lower court will have "intimate familiarity with the case, parties, and counsel, a familiarity [the Appellate Court] cannot have. Such a determination deserves substantial deference from a reviewing court."[111] Failure of the appellant to dispute the district court's award of attorney's fees in his opening brief waives his right to appeal on that issue.[112]

In determining appellate reviews of orders imposing Rule 11 sanctions, the Ninth Circuit, in *Zaldivar v. City of Los Angeles*,[113] established a three-tiered standard based upon whether the dispute on appeal concerns: (1) the facts relied upon by the district court; (2) the legal conclusions of the district court; or (3) the appropriateness of the sanction imposed.[114] The Eighth Circuit has adopted this three-tiered approach.[115] If the issue on appeal is the factual setting upon which the lower court relied, a clearly erroneous standard is to be used.[116] Due to the broad discretion given the trial court, Rule 11 damages will rarely be found excessive under the clearly erroneous standard. If the issue on appeal is the appropriateness of the lower court's determination that the legal facts establish a Rule 11 violation, the standard of review is *de novo*.[117] Finally, if the appropriateness of the sanction which the trial court imposed is disputed, the standard of review is based upon an abuse of discretion test.[118]

The Eighth Circuit recently applied the "clearly erroneous" standard in reviewing Rule 11 sanctions in *EEOC v. Milavetz*.[119] In the original *Milavetz* action,[120] the district court awarded attorney fees

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1988); Bass v. Southwestern Bell Tel., Inc., 817 F.2d 44, 46–47 (8th Cir. 1987); O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987).

109. O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987).

110. *See id.*

111. *Id.*

112. Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1331–32 (9th Cir. 1981). Furthermore, the Eighth Circuit has noted that, "a claim for attorney's fees should be treated as a matter collateral to and independent of the merits of the litigation. . . ." Gates v. Central States Teamsters Pension Fund, 788 F.2d 1341, 1343 (8th Cir. 1986). However, an order finding a party liable for attorney's fees and costs but without yet specifying the amount of the award is not a final and appealable order. *Id.*

113. 780 F.2d 823 (9th Cir. 1986).

114. *Id.* at 828 ("[a]ppellate review of orders imposing sanctions under Rule 11 may require a number of separate inquiries"). *Id.*

115. Kurkowski v. Volcker, 819 F.2d 201, 203 n.8 (8th Cir. 1987).

116. *Id.*

117. *See Zaldivar*, 780 F.2d at 828.

118. *Id.*

119. 863 F.2d 613, 614 (8th Cir. 1988).

120. Equal Employment Opportunity Commission v. Blue and White Service

against Milavetz and Associates, Blue and White's law firm, finding "the conduct of defense counsel in the course of this litigation [had] been unreasonable and outrageous."[121]

The Eighth Circuit upheld the district court's order assessing fees of $5,500 to be paid jointly by Milavetz and Blue and White.[122] In upholding the order, the court recognized that factual findings forming the basis of an alleged violation are reviewed under the clearly erroneous standard.[123] The court determined that the district court's factual findings were justified, and provided the lower court with even greater leeway under this standard by stating that "a district court need not make detailed factual findings and legal conclusions on every item of evidence presented to it."[124]

The clearly erroneous standard affords the district court wide latitude and, as the Eighth Circuit has stated, it will not interfere with a lower court's order of damages in applying this test "unless it constitutes a plain injustice, or a monstrous or shocking result."[125]

The *de novo* standard of review was applied by the Eighth Circuit in *Hartman v. Hallmark Cards, Inc.*[126] In *Hartman*, the plaintiff asserted that the defendants, Hallmark and Mattel, used Hartman's copyrighted graphics and scripts for their "Rainbow Brite" character and products.[127] The district court granted the defendants' motion for summary judgement, ruling there were no substantial similarities between plaintiff's artwork and the defendants' finished product.[128] The defendants appealed from the lower court's refusal to award at-

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Corp., 674 F. Supp. 1579 (D. Minn. 1987). The EEOC brought an action against Blue and White Service Corporation [hereinafter "Blue and White"] for its refusal to hire an applicant in retaliation for the applicant's prior filing of an employment discrimination charge. Blue and White was represented by the law firm of Milavetz and Associates, P.A. of Saint Paul, Minnesota. *Id.*

121. *Milavetz*, 863 F.2d at 614.

122. Equal Employment Opportunity Commission v. Blue and White Service Corporation, 43 Fair Empl. Prac. Cas. 1648 (BNA), No. 4-86-345, at 9 (D.Minn. May 14, 1987) (unpublished memorandum and order granting partial summary judgment in favor of plaintiff, available on Westlaw at 1987 WL 17034).

123. *Milavetz*, 863 F.2d at 614.

124. *Id.* The Eighth Circuit also applied the "clearly erroneous" standard in determining whether damages were appropriate in a non-jury trial in Overton v. United States, 619 F.2d 1299, 1304 (8th Cir. 1980). While not concerning a Rule 11 issue, the court's comments concerning the clearly erroneous standard is equally pertinent: "Although the amount of damages entered in a non-jury case is a finding of fact and therefore subject to the 'clearly erroneous' standard of review . . . any application of that general standard must take account of the special circumstances in which that kind of factual finding is rendered." *Id.* at 1304.

125. Jackson v. United States, 750 F.2d 55, 56 (8th Cir. 1984).

126. 833 F.2d 117 (8th Cir. 1987).

127. *Id.* at 119.

128. *Id.*

torney's fees under Rule 11.[129] The Eighth Circuit held that, since Hartman's challenge concerned the lower court's legal conclusion that Rule 11 was not violated, this conclusion must be reviewed *de novo*.[130] Applying the "objective reasonableness" test, the appellate court upheld the lower court's decision because "the plaintiff's case was not baseless although weak, . . . [and] the district court's order incorporate[d] the concept of objective reasonableness."[131]

The Eighth Circuit rarely overturns a sanction imposed when applying an abuse of discretion standard. In *American Inmate Paralegal Assoc. v. Cline*,[132] for example, the appellate court refused to overturn the lower court's decision to dismiss the *pro se* plaintiffs' civil rights action against prison officials. The court upheld the appropriateness of the sanction, finding that "[t]he district court's exercise of this power is within the 'permissible range of its discretion' if there has been 'a clear record of delay or contumacious conduct by the plaintiff.' "[133]

Again, in *Kurkowski v. Volcker*,[134] the Eighth Circuit upheld the district court's imposition of Rule 11 sanctions against *pro se* plaintiffs, asserting that given the soundness of that court's factual findings and legal conclusions, it did not abuse its discretion in awarding damages.[135] Despite the leniency given to the form and content of *pro se*

129. *Id.*

130. *Id.* at 124.

131. *Id.*

132. 859 F.2d 59 (8th Cir. 1988).

133. *Id.* at 61 (*quoting* Haley v. Kansas City Star, 761 F.2d 489, 491 (8th Cir. 1985)).

134. 819 F.2d 201 (8th Cir. 1987).

135. *Id.* at 203-04. *See* O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987) (substantial deference to be given to trial court's decision). The Minnesota judiciary did not reach its own decision concerning the correct standard of review to be used under the new Rule 11 until recently. In Mears Park Holding Corp. v. Morse/Diesel, 426 N.W.2d 214 (Minn. Ct. App. 1988), the Minnesota Court of Appeals made a landmark decision to abandon use of the three-tiered approach as applied by the Eighth Circuit.

Mears concerned a developer who entered into a construction management contract with the defendant. *Id.* at 215–16. The plaintiff brought an action in state court against the defendant and two other contractors, alleging breach of contract, negligence and breach of fiduciary duty. *Id.* at 216. Soon after, the plaintiff brought a similar action against the defendants in Ramsey County District Court. *Id.* The trial court found the claims in the federal and state actions to be nearly identical and concluded that, "the lawsuit started in this Court was designed to circumvent any ruling of [the federal district judge] which might be adverse to the Mears Park interests." *Id.* In response to a motion by defendants, the court assessed $29,663.10 in attorney's fees against the plaintiffs. *See id.* at 215.

On appeal, the Minnesota court found that, while under section 549.21 subd. 2 of the Minnesota Statute an abuse of discretion standard of review is clearly the appropriate basis on which to assess damages, "[t]here is, however, no established standard of review for Rule 11 cases in Minnesota." *Mears*, 426 N.W.2d at 217. After

complaints, the court refused to overturn the district court's decision concerning the appropriateness of the sanction because of the broad discretion given to the trial judge.

C. Pro Se *Litigants and Client v. Counselor: Who Bears Responsibility?*

Rule 11, under the newly amended changes, refers to persons or parties other than attorneys.[136] Courts have unanimously interpreted the new language of Rule 11 to apply to *pro se* litigants, allowing *pro se* parties to be sanctioned under the rule. Eighth Circuit courts have not hesitated to do so.[137] In *Kurkowski*, the Eighth Circuit Court of Appeals recognized "that *pro se* complaints are read liberally, but they still may be frivolous if filed in the face of previous dismissals involving the exact same parties under the same legal theories."[138]

In non-*pro se* actions, it is normally the attorney who is held responsible for Rule 11 violations, however, imposing joint and several liability upon client and counselor is generally acceptable. For example, joint responsibility has been placed on a plaintiff who permitted

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reviewing the three-tiered approach, the court opted to follow an across the board abuse of discretion standard adopted by the Fifth Circuit in Thomas v. Capital Sec. Services, Inc., 836 F.2d 866 (1988). Using this approach, the appellate court upheld the lower court's determination. *Mears*, 426 N.W.2d at 218, 220.

The Minnesota Court of Appeals chose to adopt this standard for four reasons. First, a discretionary standard of review for Rule 11 corresponds with Minnesota's abuse of discretion standard necessary for an award for attorney's fees per MINN. STAT. § 549.21. *Id.* at 218. Second, the three-tiered standard, while reasonable, is too complex. *Id.* Third, the trial judge is in the best position to determine whether Rule 11 sanctions should be imposed. The court stated that:

> The imposition or denial of sanctions of necessity involves a fact-intensive inquiry into the circumstances surrounding the activity alleged to be in violation of Rule 11. The perspective of a district court is singular. The trial judge is in the best position to review the factual circumstances and render an informed judgement as he is intimately involved with the case, the litigants and the attorneys on a daily basis.

Id. at 218 (*quoting* Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988)).

The purpose of differing standards is to provide varying bases upon which to make Rule 11 determinations, but in the final analysis, the courts all seem to apply a discretionary standard in reviewing trial court Rule 11 decisions. This may explain why the *Mears* court chose to abandon the clearly erroneous and *de novo* standards. Absent a clear finding that the lower court acted egregiously in abusing its discretion, the *Mears* decision indicates that a Minnesota appellate court will not alter an order concerning Rule 11 issues.

136. *See* FED. R. CIV. P. 11. This rule refers to the signature of "an attorney or party." In discussing sanctions it states the court shall impose them "upon the person who signed [the paper, pleading or other motion], a represented party, or both." *Id.* It also states that "[a] party who is not represented by an attorney shall sign [his] pleading, motion, or other paper. . . ." *Id.*

137. *See, e.g.*, *Kurkowski*, 819 F.2d 201, 203–04 (8th Cir. 1987).

138. *Id.* at 204.

her counsel, in bad faith, to continue to assert legal claims without merit in an amended complaint.[139] Rule 11 damages have also been imposed against a plaintiff as well as his attorney who admitted that he had no evidence (nor did his counsel) upon which to base the action.[140] Moreover, in *Bastien*, the case underlying the *Lupo* decision, the district court held both the attorneys and clients at fault, and ordered sanctions in the amount of $100,000 to be paid by the plaintiffs and their attorneys.[141] It noted that, "[t]he Court does not hold plaintiffs blameless. This was their litigation, and their counsel must be deemed to have acted at their direction."[142]

However, Rule 11 sanctions are not proper against a client in cases where the party does not knowingly authorize or assist in the filing of a paper in violation of Rule 11, or where the attorney fails to advise the client of the wrongfulness of filing a paper signed or prepared by the client which violates the rule.[143]

In rare cases, sanctions will be imposed solely on the client. Where the client misleads his counsel as to the facts or purpose of the lawsuit, Rule 11 sanctions will be imposed on the client alone if the attorney had objectively reasonable grounds upon which to sign the papers at issue.[144]

Theoretically, the allocation of responsibility between client and attorney is logical and just. In reality, however, the assessment of fault between the two parties is difficult. Furthermore, it raises serious problems concerning the attorney-client privilege: "If attorney and client disagree about who is at fault and point their fingers at each other, the interests of the two are now clearly adverse."[145] The client will be forced to obtain a new attorney to represent his interests in the Rule 11 proceeding. The potential problems in the ensuing hearing are obvious, as is the effect the ally-turned-enemy status

139. *See* Andre v. Merrill Lynch Ready Assets Trust, 97 F.R.D. 699, 702–03 (S.D.N.Y. 1983).

140. *See* Viola Sportswear, Inc. v. Mimun, 574 F. Supp. 619, 620–21 (E.D.N.Y. 1983).

141. *Bastien*, 116 F.R.D. 619, 620–21 (E.D. Mo. 1987).

142. *Id.* at 621.

143. *See* Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1474–75 (2d Cir. 1988).

144. *Id.* at 1475. At least one court has suggested, however, that Rule 11 technically should not apply at all in cases in which the client alone has acted wrongly. "Rule 11 does not, by its terms, provide for sanctions against the filing of frivolous papers. Rather, it provides for sanctions against an attorney's filing papers without making an adequate inquiry." *Eastway*, 637 F. Supp. at 569. Due to the fundamental unfairness in the result of this interpretation of the rule, the court decided the "better conclusion is that sanctions may be imposed against the client . . . despite the flaw in the Rule's language." *Id.* at 570.

145. *Id.*

of counsel will have on the attorney-client relationship.[146]

Rule 11 is silent on the subject of whether its monetary sanctions may be imposed only against the counselor-defendant or against her law firm as well. The Fifth, and, more recently, Second Circuits have discussed this issue on the appellate level. The Fifth Circuit found that only the attorney signing the document at issue would be held liable for Rule 11 violations, since holding otherwise would cause "satellite litigation over exactly who [in a firm] was responsible for a particular document."[147]

The Second Circuit disagreed with the Fifth Circuit decision, stressing that "law firms hold themselves out to clients, to courts and to other counsel as more than mere aggregations of individual practitioners sharing a phone."[148] Based on the partnership-like relationship between the attorney and his law firm, the court held that

> [t]he purposes of the 1983 amendment to Rule 11 will. . .be best served by holding law firms responsible for the acts of their attorneys. . . . Firm responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims.[149]

D. Nature of Sanctions Imposed

The original Rule 11 provided that an attorney acting in bad faith could "be subjected to appropriate disciplinary action."[150] While this line was deleted in the 1983 amendment, the new rule still provides that the court "shall impose . . . *an appropriate sanction*, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee."[151]

The wide latitude given the court under the new rule allows for the imposition of virtually any penalty it finds appropriate: "The court's options are no longer limited to the drastic—and therefore rarely imposed—sanction of striking the offending pleading. Instead, the

146. *See*, Schwarzer, *Sanctions Under The New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 199 (1985).

147. Robinson v. Nat'l Cash Register Co., 808 F.2d 1119, 1129 (5th Cir. 1987).

148. *Calloway*, 854 F.2d at 1479.

149. *Id.* at 1479–80. *See, e.g.*, Anschutz Petroleum Mktg. Corp. v. E.W. Saybolt & Co., 112 F.R.D. 355 (S.D.N.Y. 1986) (the court reduced the firm's fees as a deterrent from transgressions of Rule 11 when it determined the time devoted to the litigation was excessive); Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986) (sanctions ordered paid by firm when attorney's motion based on the statute of limitations was not warranted by existing law).

150. *See supra* note 12 (pre-1983 amendment).

151. FED. R. CIV. P. 11 (emphasis added)

rule makes sanctions mandatory but leaves the specific sanction to the discretion of the judge, allowing it to be tailored to fit the situation."[152]

The judiciary has commented that Rule 11 has three major goals: (1) compensation; (2) deterrence; and (3) punishment.[153] These goals correspond with the three major forms of Rule 11 sanctions: (1) monetary; (2) dismissal of the action; and (3) suspension or disbarment of the attorney.[154]

1. Monetary Sanctions

It has long been the rule in American courts that all parties to a dispute are responsible for their own attorney fees, absent a specific exception.[155] One such exception is Rule 11. The most common Rule 11 sanction is to assess attorney's fees and costs to the aggrieved party. Rule 11 requires only that the expenses and fees awarded be incurred as a direct result of the violation, and that the amount awarded be reasonable.[156]

One commentator suggests that, to determine the appropriate and reasonable amount of monetary penalties, standards be promulgated which require the moving attorney to submit detailed records offering evidence of hours expended, nature of the work completed, prevailing community rates and affidavits confirming "fees similarly qualified attorneys have received from paying clients in comparable cases."[157] While this suggested evidence is not yet required, the trend in the court system appears to be moving towards this more fair approach in determining monetary sanctions.

In *Brandt v. Schal Associates, Inc.*,[158] the court requested that the receiving party submit a breakdown of expenses.[159] The *Eastway* dis-

152. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1321 (1986).

153. *Mears*, 426 N.W.2d at 219.

154. *Roadway Express*, 447 U.S. at 764.

155. *See* Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 458 (8th Cir. 1983).

156. As the Supreme Court noted in *Roadway Express*, "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's powers." *Roadway Express*, 447 U.S. at 767.

157. Oliphant, *Rule 11 Sanctions and Standards: Blunting the Judicial Sword*, 12 WM. MITCHELL L. REV. 731, 747 (1986).

158. 121 F.R.D. 368 (N.D. Ill. 1988).

159. *Id.* In determining the amount of fees to be awarded, the District Court for the Northern District of Illinois employed a "but for" standard. Thus the aggrieved party could recover their expenses of "drafting and filing every paper in the District Court and appearing at the various hearings held here" since "but for" the violator's filing, the expenses wouldn't have been incurred. *Id.* at 389. All research expenses were also recoverable, since "but for" the Rule 11 defendant's factually unsupported complaint, the opposing party would not have been forced to claim in both federal

trict court suggests that "the logical starting point for determination of attorney's fees is a calculation of the number of hours reasonably expended in responding to the frivolous paper, multiplied by a reasonable hourly attorney's fee based on the prevailing market rate."[160]

Monetary sanctions will rarely be reduced. The difficulty, as the Eighth Circuit notes, is that "a judge is seldom able to make adequate appraisal of what is necessary for counsel to do or not do in a given case. This appraisal turns on so many subjective factors that it seldom should be the basis for reduction of an attorney fee."[161]

The Eighth Circuit has appeared hesitant to assess fines greater than attorney's fees. However, recent decisions indicate an increase in the imposition of monetary sanctions. In *Ueckert v. Commissioner*,[162] while the Eighth Circuit Court of Appeals refused to assess attorney's fees or damages against a plaintiff bringing a frivolous appeal, the court gave fair notice to litigants that it would not be lenient in the future.

> Meritless appeals of this nature are becoming increasingly burdensome on the federal court system. While sanctions will be denied in the present case, we give notice that, in the future, this court will consider assessing just damages as well as double costs for taking frivolous appeals on issues already clearly resolved.[163]

It did so one year later in *Hughes v. Hoffman*.[164] While the court refused to fully compensate the appellee for damages, it cited its warning in *Ueckert*, and assessed attorney's fees and double costs against the appellant and his attorney jointly and severally for their attempt to re-litigate a matter which had been litigated and closed.[165]

While assessing attorney's fees and costs against a party clearly meets the compensation goal of Rule 11 and serves as a fee-shifting device, imposing additional fines or penalties serves to punish the Rule 11 violator and to deter the type of activity which caused the sanction.

The courts frequently find monetary sanctions most appropriate. As the Ninth Circuit has emphasized, "imposing a monetary penalty on counsel is an appropriate sanction considerably less severe than holding counsel in contempt, referring the incident to the client or

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and state courts. *Id.* The Rule 11 defendant created a sufficient "but for" nexus which required repayment by the violator of costs "it should never have made in the first place." *Id.*

160. *Eastway*, 637 F. Supp. 558, 571 (E.D.N.Y. 1986) (citations omitted).
161. *Jaquette*, 710 F.2d at 460.
162. 721 F.2d 248 (8th Cir. 1983).
163. *Id.* at 251.
164. 750 F.2d 53 (8th Cir. 1984).
165. *Id.* at 55.

bar association, or dismissing the case."[166]

However, not all courts agree with the Ninth Circuit's statement that monetary fines are less repugnant than other forms of sanctioning. In *Anderson v. Lindgren*,[167] the Minnesota Court of Appeals observed that an award of attorney's fees, even against a party acting in bad faith, is a distasteful judicial function that may not be "[the] most appropriate method by which to deal with recalcitrant parties or counsel. Courts have at their disposal less intrusive sanctions and cautions which should be explored and exhausted before resorting to an award of attorney's fees."[168]

A recent report by the Third Circuit Task Force on Rule 11 recommends that "[d]eterrence of abuse by the person(s) sanctioned . . . should be regarded as Rule 11's most important goal and compensation as only one (among many) means to that end, not an end in itself."[169]

Because disciplinary action in the form of disbarment or suspension is impossible, the only options available in *pro se* cases are dismissal of the claim and/or the imposition of monetary sanctions. A problem has arisen when the *pro se* party is destitute or imprisoned. The Eighth Circuit addressed this issue in *In Re Tyler*.[170] The plaintiff, a former inmate, filed numerous frivolous claims in his own name and on behalf of other inmates at the state penitentiary. The court found that the *pro se* plaintiff clearly deserved sanctions.[171] However, "his lack of funds. . . preclude[d] the typical sanctions available to the courts for imposition upon other abusive litigants, such as those permitted by Rule 11. . . ."[172] Similarly, denial of his right to proceed *in forma pauperis* would have completely denied his access to the court.[173] The court determined that the only sanction available would be to severely limit the number of cases he could file with the court.[174]

2. *Dismissal of the Case*

While the sanction of dismissal should be imposed only if the case is meritless or frivolous, rather than to punish a negligent attorney,

166. *Miranda*, 710 F.2d at 520–21.
167. 360 N.W.2d 348 (Minn. Ct. App. 1984).
168. *Id.* at 353.
169. TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (pending publication 1989).
170. 839 F.2d 1290 (8th Cir. 1988).
171. *Id.*
172. *Id.* at 1294.
173. *Id.*
174. *Id.*

the Supreme Court has clearly vested that power in the district courts. On this issue the Court has stated that:

> The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law, and dismissals for want of prosecution of bills in equity.[175]

The Eighth Circuit has recognized this authority, and has upheld the dismissal of actions grounded on meritless claims.[176] Dismissal of claims under a Rule 11 violation serves to deter parties attempting to bring frivolous or vexatious litigation into the court system. Therefore, it may be justified in limited circumstances. However, dismissal should not be used as a means of punishing or deterring attorney misconduct alone. As Justice Black made clear in his dissenting opinion in *Link v. Wabash Railroad Co.*,[177] dismissal may inflict:

> a serious injury upon an injured man and his family, who are innocent of any wrongdoing. Plaintiff's cause of action . . . was his property. It has been destroyed. The district court, to punish a lawyer, has confiscated another's property . . . [a] district court does not lack disciplinary authority over an attorney and there is no justification, moral or legal, for its punishment of an innocent litigant for the personal conduct of his counsel. . . .[178]

However, in the case of the indigent Rule 11 violator, monetary sanctions are unrealistic; in the case of the *pro se* party, suspension or disbarment from the practice of law is obviously not an option. Therefore, dismissal of the claim may be the only available alternative, as demonstrated in the Eighth Circuit's recent decision in *American Inmate Paralegal Association v. Cline*.[179] The court stipulated that "[*p*]*ro se* litigants are not excused from complying with court orders and substantive or procedural law."[180] Affirming the district court's decision, it found that "[e]ven if there was any merit to appellants' complaint against the prison officials, the voluminous amount of friv-

175. *Roadway Express, Inc.*, 477 U.S. at 765.

176. *See, e.g., American Inmate Paralegal Assoc.*, 859 F.2d 59 (8th Cir. 1988).

177. 370 U.S. 626 (1962).

178. *Id.* at 637 (Black, J., dissenting). The Second Circuit has recognized the harshness of the dismissal order. It therefore suggests "that the [district] court keep in mind the possibility, in future cases of inexcusable neglect by counsel, of imposing substantial costs and attorney's fees payable by offending counsel personally to the opposing party, as an alternative to the drastic remedy of dismissal." Schwarz v. U.S., 384 F.2d 833, 836 (2d Cir. 1967).

179. 859 F.2d 59 (8th Cir. 1988).

180. *Id.* at 61.

olous documents submitted by appellants . . . in connection with this litigation supports the dismissal with prejudice as a Rule 11 sanction."[181]

3. Suspension or Disbarment of the Attorney

The most severe punishment for a Rule 11 violation, from the attorney's perspective, is disciplinary action against the lawyer. In *Van Berkel*,[182] counsel (who, it should be noted, had already been ordered to personally pay defendant's costs, expenses and attorney's fees) appeared before the Supreme Court of Minnesota for disciplinary proceedings for his failure to voluntarily dismiss a claim which was barred by the statute of limitations, after defense counsel's repeated requests.[183] The court upheld the referee's recommended public reprimand and six-month suspension from practice. It found that, "[a]n attorney who deliberately deceives the court is guilty not only of obstructing the administration of justice but also of subverting that loyalty to the truth without which he cannot be a lawyer in the real sense of the word."[184] While determining the most appropriate sanction is difficult, the "[p]unishment should never exceed the amount required to achieve the result desired. A deterrent is therefore appropriate when it is the minimum that will serve to adequately deter the undesirable behavior."[185]

Each penalty has its proper place in the Rule 11 sanction system: monetary sanctions are most commonly employed as they perform the most equitable function by restoring the aggrieved party to prelitigation status. If monetary awards exceed attorney's fees, they serve the additional purposes of deterrence and punishment. Dismissal can be used in cases of *pro se* or indigent violators, however, it should be used sparingly. In extreme situations of attorney misconduct, disbarment or suspension will serve to punish as well as deter. Finally, the court is not limited to these forms of sanctioning. Other penalties, such as reprimand or an order requiring the attorney to attend court sessions or remedial courses may also be imposed at the court's discretion.

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181. *Id.* at 62.

182. 581 F. Supp. 1248, *aff'd sub nom.*, *Discipline of Schmidt*, 402 N.W.2d 544 (Minn. 1987).

183. Matter of Discipline of Schmidt, 402 N.W.2d 544, 545–46 (Minn. 1987) (arising from Van Berkel v. Fox Farm and Road Mach., 581 F. Supp. 1248 (1984)).

184. *Id.* at 548–49 (*quoting*, *In Re Nilva*, 266 Minn. 576, 583, 123 N.W.2d 803, 809 (1963)).

185. Eastway Construction Corp. v. City of New York, 637 F. Supp. 558, 565 (E.D.N.Y. 1986) (citations omitted).

E. Judicial Supervision

While the trial courts are now imposing penalties more readily for violations of counsel's responsibilities, the Eighth Circuit has taken the view that ensuring that the lawyers' responsibilities are met is, at least in part, a duty of the court itself.[186] The Eighth Circuit recently stated that "[i]n almost all cases the key to avoiding excessive costs and delays is early and stringent judicial management of the case. Sending counsel off into extended 'paper chases' in compliance with pretrial orders has now been demonstrated not to be the answer."[187] Judicial supervision will serve to allocate the burden of avoiding frivolous claims between the court and the attorney, since "excessive costs of litigation is as much the court's concern as it is of counsel and litigants. . . . [I]t is time to recognize that the adjudication process begins at the time of the filing of the complaint and carries through to the last appeal."[188]

IV. Preventing Sanctions under the New Rule

In addition to the obvious precautionary steps which may be taken to circumvent Rule 11 violations, such as avoiding frivolous or harassing claims, there are several other factors which the courts consider in Rule 11 deliberations. This Note suggests four areas which may be important to the Eighth Circuit attorney.

First, because the court may no longer base its decision on a good faith inquiry, it must now look for more subtle examples of frivolousness, harassment, or coerciveness. To do so, the court will look first to the only tangible evidence at its disposal: documents submitted by counsel. *Lupo* and *Milavetz* notwithstanding, Rule 11 violations must be based on a specific pleading, motion or other paper submitted to the court. Therefore, the court will meticulously scrutinize briefs, memoranda and other papers written or certified by counsel. The courts have cited the following examples which may, collectively or in part, indicate a lack of a valid claim on the part of the attorney or party: (1) the fact that counsel's opening argument memorandum exaggerates existing law and implies that the argument upon which the claim is based is warranted by existing law when, in fact, it is not;[189] (2) when a brief submitted on appeal from sanctions differs substantially from the memorandum originally submitted concerning the original claim;[190] (3) failure in a brief to cite adverse authority;[191]

186. Jaquette v. Black Hawk County, 710 F.2d 455 (8th Cir. 1983).
187. *Id.* at 463.
188. *Id.*
189. *Id.* at 126–27.
190. *Id.* at 127.
191. *Id.*

and (4) when an amended complaint simply embellishes, rather than alters, an original complaint.[192]

Second, it is imperative that an attorney stay in regular contact with his client. Obviously, maintaining written documentation of this is advisable. In *Matter of Discipline of Schmidt*,[193] the court repeatedly referred to the fact that not only did the attorney make misrepresentations, but he also "grossly neglected his client's matters, and, not only neglected the matters, but failed to keep in communication with his clients and answer their inquiries concerning their cases."[194]

Third, the Second Circuit, in *Nemeroff v. Abelson*,[195] indicated that a factor to consider in determining whether counsel has maintained an action grounded on baseless allegations is the speed at which the attorney investigates the matter. While the court in *Nemeroff* noted that it did not "mean to imply that a litigant is entitled to attorney's fees whenever an opponent fails to conduct discovery at full speed," it agreed with the trial court that "the pace of discovery" can be an appropriate factor to consider in imposing sanctions.[196]

Finally, the behavior of counsel and his client during the course of the proceedings will be considered. In *Anderson v. Lindgren*,[197] the Minnesota Court of Appeals upheld the trial court's decision to assess sanctions against both a client and her attorney. The attorney's behavior, which included "making inappropriate facial expressions, loudly demanding mistrial in front of the jury . . . and engaging in generally disruptive activity" contributed to the court's belief that the attorney had violated Rule 11.[198]

V. Has the New Rule Gone Too Far?

The logic upon which the new Rule 11 was built is sound. While the rule serves to deter duplicitous litigation, to unclutter the court dockets, and to prevent unnecessary costs from being imposed upon innocent parties, its frequent enforcement and liberal interpretation may pose considerable risks to the free spirit of the adversarial system. One major problem is that because local rules or standards are lacking, courts take conflicting approaches in determining Rule 11 violations. In analyzing a survey conducted in 1985 by the Federal

192. Andre v. Merrill Lynch Ready Assets Trust, 97 F.R.D. 699, 701 (S.D.N.Y. 1983).

193. 402 N.W.2d 544, 549 (Minn. 1987).

194. *Id.* at 549.

195. 704 F.2d 652 (1987).

196. *Id.* at 666.

197. 360 N.W.2d 348 (Minn. Ct. App. 1984).

198. *Id.* at 352.

Judicial Center,[199] one commentator found that "[t]he proper application of Rule 11 is so unclear that about half the judges in the survey would have sanctioned as frivolous the same paper the other half of the responding judges thought did not violate the rule."[200] These incongruous results may 'chill' litigation.

First, it may deter plaintiffs from suing to enforce their rights. To avoid this, it is imperative that courts "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."[201] The fact that bad faith is no longer a prerequisite to a Rule 11 violation means that more discretion be exercised by the district courts to ensure fair and objective analysis of a claim. The use of hindsight logic may exclude all but the most meritorious claims.

Second, even if a cautious plaintiff decides to risk proceeding on a dubious claim, the now prevalent imposition of Rule 11 sanctions may thwart creative or ingenious methods of presenting claims. The Eighth Circuit has already recognized this growing problem. It states that the sanctioning of attorneys under the amended Rule 11, "might discourage or 'chill' vigorous and ingenious advocacy, especially in matters of controversial character where there is a reasonable likelihood of achieving potential change in the law."[202] Bright line rules in the legal arena are rare indeed, and no prospective plaintiff can be assured of success. Claims which have been brought successfully in recent years, including palimony,[203] the duty to warn of infectious diseases,[204] and the right to protect one's voice or likeness[205] may have been considered "frivolous" or "meritless" had Rule 11 been employed as widely in the past as it is today.

Finally, there may be no more eager or idealistic attorney than the neophyte who enters the legal profession anxious to break new ground in the legal system. This fresh and unique perspective should not be bridled by the fear of retribution for suggesting or pursuing new causes of action. The courts have recognized this issue and are now often taking the experience of the attorney into consid-

199. Kassin, *An Empirical Study of Rule 11 Sanctions* 38 (Federal Judicial Center 1985).

200. Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. R. 630, 641 (1987).

201. Christianburg Garmet Co. v. EEOC, 434 U.S. 412, 421–22 (1978), quoted in Bass v. Southwestern Bell Telephone, Inc., 817 F.2d 44, 47 (8th Cir. 1987).

202. Aetna Casualty & Surety Co. v. Fernandez, 830 F.2d 952, 956 (8th Cir. 1987).

203. *See, e.g.*, Marvin v. Marvin, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

204. *See, e.g.*, R.A.P. v. B.J.P., 428 N.W.2d 103 (Minn. Ct. App. 1988).

205. *See, e.g.*, Motown Record Corp. v. Hormel & Co., 657 F. Supp. 1236 (C.D. Cal. 1987).

eration prior to imposing Rule 11 sanctions.[206]

Because the new Rule 11 extends to *pro se* litigants, the possibility that the indigent petitioner will not be able to have his day in court is much greater. A cornerstone of the American judicial system is that the poor are no less entitled to free access of the courts than are the wealthy. However, under the new Rule 11, this may no longer be as true. The *pro se* litigant who prepares his own case may be disadvantaged by the new rule. Only parties who can afford law firms, employing attorneys familiar with the types of actions which risk Rule 11 violations will be assured that they themselves will not risk fines or dismissal of their case. The *pro se* party will be intimidated by the possibility that her claim will be found to violate Rule 11. Furthermore, since evidentiary hearings are not yet mandatory, the *pro se* plaintiff may not be given the opportunity to explain the reasons behind his cause of action.

Finally, the liberal interpretation of Rule 11 by the Eighth Circuit raises serious questions concerning the adversarial system. In *Bastien*,[207] the original case from which *Lupo* arose, plaintiffs purchased limited partnership interests in five limited partnerships organized to distribute motion pictures (a notoriously high-risk investment) at a time when they were a recognized tax shelter.[208]

The partnerships proved unprofitable and only a year after the investments were made, Congress eradicated the tax shelter. The plaintiffs filed suit, alleging that the defendants had defrauded them of their investment capital by organizing the limited partnerships so that the general partners would receive a profit but the limited partners would not.[209] The defendants eventually moved for summary judgement, which, after several repeated motions to dismiss, was granted.[210] On the defendants' request for attorney's fees and expenses, the district court awarded defendants $100,000 due to plaintiffs' and their counsel's bad faith conduct.[211] In doing so, the court noted that nearly four years after the claim was brought, the plaintiffs still "stood wholly without proof of their claims."[212]

The court employed the "objective reasonableness" standard required by the new rule: that "sanctions shall be imposed [if], after reasonable inquiry, a competent attorney could not form a reason-

206. *See, e.g.*, Huettig & Schromm, Inc. v. Landscape Contractors Council of Northern California, 790 F.2d 1421, 1427 (9th Cir. 1986); Johnson v. Kut Kwick Corp., 620 F. Supp. 748 (S.D. Ga. 1984).

207. 631 F. Supp. 1554 (E.D.Mo. 1986), *aff'd*, Lupo v. R. Rowland & Co., 857 F.2d 482 (8th Cir.), *cert. denied*, Bastien v. R. Rowland & Co., 108 S.Ct. 160 (1988).

208. *Bastien*, 631 F. Supp. at 1556.

209. *Id.* at 1557.

210. *Id.* at 1559.

211. *Bastien*, 116 F.R.D. at 620–21.

212. *Id.* at 621.

able belief that the pleading is well grounded in fact and is warranted by existing law. . . ."[213] On appeal, the Eighth Circuit upheld the trial court's decision.[214] Despite the attorneys' objections based on the fact that the district court did not make its findings on a specific pleading, motion or other paper, but rather on the "bulk of the filings," the court refused to reverse the decision.[215] *Lupo* may change the course of Rule 11 findings in the Eighth Circuit, as it has given district courts in this circuit the power to impose Rule 11 sanctions based on their impressions of the entire conduct of the attorneys during the proceedings, rather than on any tangible documentary material.

Shortly after the *Lupo* decision, the court made a similar ruling in *Milavetz*. The district court, in *EEOC v. Blue and White Service Corp.*,[216] noted that counsel for defense repeatedly failed to respond to discovery requests by EEOC, that neither the defendant nor defense counsel cooperated with EEOC's efforts at conciliation, and that they displayed a pattern of uncooperativeness and delay throughout the proceeding.[217] Rather than base its finding on a specific document, the district court instead imposed attorney's fees against the defense counsel based on the "totality of the circumstances" concerning counsel's conduct.[218] The Eighth Circuit affirmed the lower court's decision using an "abuse of discretion" standard.[219]

The Eighth Circuit appears to be following the "continuing duty" approach which was adopted by the Fourth Circuit in *Basch v. Westinghouse Electric Corp.*[220] In *Basch*, the court affirmed an award of attorney's fees based not on a specific pleading or paper, but rather on the attorney's indecision as to whether he would call an expert witness named in an interrogatory response.

The Second Circuit has recognized the dangers of imposing such a duty:

> Limiting the application of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule. . . .
>
> While the drafters of the rule could easily have further extended its application by referring to the entire conduct of the proceed-

213. *Id.* (*citing* Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985)).

214. *Lupo*, 857 F.2d at 484.

215. *Id.* at 485.

216. EEOC v. Blue and White Service Corp., (unpublished memorandum and order) [available on Westlaw, 1987 WL 17034].

217. *Id.* at slip op. 9.

218. *Id.* at slip op. 10.

219. EEOC v. Milavetz and Associates, 863 F.2d 613, 614 (8th Cir. 1988) (citation omitted).

220. 777 F.2d 165 (4th Cir. 1985).

> ings, they failed to do so and instead chose to expand only the categories of papers to which the rule applies.[221]

The Eighth Circuit's recent rulings mean that lawyers must remain alert to the possible ramifications of all of their actions during trial. However, the judiciary's continued willingness to take responsibility in curbing abuse of the system before sanctions become necessary may ease counsel's burden.

In addition, the increasing use of strict guidelines in imposing sanctions under the new Rule 11 will help prevent its overuse. While the local rules that have been suggested are not yet in effect, many of these concerns have been met as the courts continue to create standards upon which to base Rule 11 sanctions. Requiring an evidentiary hearing prior to the imposition of penalties in Rule 11 cases is one procedural safeguard which, while not yet mandatory, is widely recognized. By providing the Rule 11 defendant with the opportunity to submit a brief outlining the party's reasons for its actions, the court will not be tempted to use *post hoc* reasoning and logic.

Using guidelines to judge the severity of a Rule 11 violation will also give the court a set of criteria upon which to determine the appropriate sanction, if any, to impose. One court suggests that, before an attorney or client is severely sanctioned, an evidentiary hearing must be provided to afford an opportunity to consider factors which would "justify the court's mitigating the severity of the sanctions imposed."[222] These factors include: (1) whether the party acted in good faith; (2) whether the party acted to punish opposing party or acted vindictively; (3) whether the attorney was a neophyte, or an experienced attorney with a "clean" record; (4) the party's financial resources relating to his ability to pay; (5) the need for compensation of the opposing party; (6) the degree of frivolousness; and (7) the consideration of the dangers inherent in Rule 11 sanctions concerning the chilling of the adversarial process.[223] The report of the Third Circuit Task Force on Rule 11 suggests that, while evidentiary hearings normally are not necessary, Rule 11 sanctions be imposed upon a party "[o]nly after that individual has had suitably specific notice and an adequate opportunity to be heard."[224]

CONCLUSION

The importance of not allowing "sanctionitis" to become an un-

221. Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied sub nom.*, 480 U.S. 918 (1987).

222. Eastway Const. Corp. v. City of New York, 637 F. Supp. 558, 569 (E.D.N.Y. 1986).

223. *Id.* at 571.

224. RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (pending publication 1989)

controllable epidemic with adverse consequences to the American legal system is now recognized by the courts. By using judicial monitoring, strict guidelines outlining the appropriateness of sanctions, and the mandating of due process safeguards, Rule 11 can continue to serve its legitimate and necessary function. The creation of a Rule 11 Task Force in the Eighth Circuit could help to identify problem areas and recommend these guidelines, as did the Third Circuit's task force.

However, it must be remembered, as noted by Justice Brandeis, that "lawsuits . . .often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."[225] Furthermore, it is vital that the *pro se* litigant not be deterred from bringing or defending a valid claim. Nor can the legal system afford to lose the creative attorney willing to forge a new cause of action.

Finally, while the new rule is intended to stop abuse, it is not "a panacea intended to remedy all manner of attorney misconduct occurring before or during the trial of civil cases."[226] Basing Rule 11 violations on anything other than a specific pleading, motion or other paper may overstep the limits of the rule. Strict interpretation of the rule by imposing penalties based only on specific documents will help to eliminate this danger.

Nancy Burger-Smith

225. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51–52 (1938) (cited in Aetna Casualty & Surety Co. v. Fernandez, 830 F.2d 952, 956 (8th Cir. 1987)).

226. Adduono v. World Hockey Ass'n, 824 F.2d 617, 621 (8th Cir. 1987) (*citing* Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986)).